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Practice and Procedure--Statutes of Limitations--Interpretation of Saving Clauses

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> We do not believe it is cynical to suggest that complete rapport is not always reached. It is not unbelievable that submission is had as a convenient avoidance of imminent trouble.[15]

Thus, this writer is in full accord with the statement of law enunciated by Keezer. Mere cohabitation and probable or actual sexual intercourse following the accrual of the cause of action for divorce based on cruelty should not result in condonation unless there is an unequivocal intent to forgive and resume marital relations. Kentucky has, by dictum in the principal case, seemingly placed itself among the followers of this rule. Although not stating in affirmative language what facts will constitute condonation of cruelty the Kentucky court has stated negatively that, ". . . condonation will *not* be implied from either living together or acts of coition."[16] (Emphasis supplied). The ascertainable affirmative implication from this statement would seem to be that no condonation will arise unless there is proven an unequivocal intent to forgive. Thus Kentucky has not made condonation as applied to cruelty too difficult of proof but has merely declared itself a follower of the better rule.

J. MONTJOY TRIMBLE

PRACTICE AND PROCEDURE—STATUTES OF LIMITATIONS—INTERPRETATION OF SAVING CLAUSES—Plaintiff, as ancillary administrator, brought suit on May 4, 1953, in Oldham Circuit Court against defendant for negligently killing plaintiff's decedent in an automobile accident on Feb. 12, 1951. Decedent's domiciliary administrator, an Ohio resident, had previously on July 12, 1951, brought a similar suit in Federal District Court for the Western District of Kentucky, which had been dismissed on the ground that the Ohio administrator could not maintain the action in Kentucky. Plaintiff was then appointed ancillary administrator, and brought suit in the federal District Court for the Eastern District of Kentucky on January 20, 1952, less than a year after the accident, and thus before the statute of limitations had run. On April 28, 1952, this suit was dismissed because of lack of jurisdiction, the District Court failing to find any diversity of citizenship since both the plaintiff and the defendant were residents of Kentucky. This judgment was affirmed by the United States Court of Appeals on Feb. 16, 1953.[1] Relying upon Kentucky Revised Statutes 413.270,[2] which pro-

[15] *Supra* note 2 at 555. [16] *Id.* at 556.

[1] Ockerman v. Wise, 202 F. 2d 144 (6th Cir. 1953).

[2] "If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged

vides that a party who has brought suit in "any court of this state" and had it dismissed for lack of jurisdiction may bring suit in the proper court within three months after such judgment, the plaintiff on May 4, 1953, brought the instant suit in Oldham Circuit Court. The defendant pleaded the one-year statute of limitations, and argued that the running of the statute had not been tolled by plaintiff's action in federal court because a federal court was not a "court of this state" within the meaning of the statute. Defendant also contended that even if it were, the plaintiff's suit had not been brought "within three months from the time of that judgment," since "judgment" as used in the Kentucky tolling statute meant the judgment of the trial court and not the judgment of the appellate court which had merely affirmed the judgment below. The trial court adopted defendant's view of the law and dismissed the case, but the Court of Appeals reversed, ordering the case to proceed to trial on its merits. *Ockerman* v. *Wise*, 274 S.W. 2d 385 (Ky. 1954).[3]

The Court, in examining the question of whether a federal district court is a "court of this state," relied primarily on *Merko* v. *Sturm & Dillard Co.*,[4] a federal case interpreting the same Kentucky statute. In the *Merko* case the plaintiff, after having a seasonably filed suit dismissed from federal court on the grounds that he had not sued the defendant, an out-of-state corporation, in the district of its residence, brought another action in state court although the one-year statute of limitations had run. On the basis of diversity of citizenship, the defendant had this suit removed to federal court, the same federal court, incidentally, whose jurisdiction he had successfully denied earlier. He then made the same plea that the defendant made in the *Ockerman* case—that the action brought in the state court was barred by the one-year statute of limitations, and was not saved by the tolling statute since the federal district court was not a "court of this state". As in the *Ockerman* case, the trial court agreed with this contention, but the federal court of appeals reversed on the grounds that the legislative purpose was to permit adjudication on the merits of a claim and that the statute was not to be narrowly construed. In following this precedent, the Kentucky court decided exactly the same point that the

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that the court has no jurisdiction of the action, the plaintiff or his representative may, within three months from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation."

[3] Rehearing denied, Jan. 28, 1955.

[4] 233 F. 68 (6th Cir. 1916).

federal court had decided earlier and reached exactly the same conclusion.[5]

It is submitted that the court reached the correct result in so ruling. There is, however, some Kentucky authority pointing toward a contrary conclusion. For example, in interpreting this same statute, the court had held that the Workmen's Compensation Board is not a "court of this state."[6] In interpreting another Kentucky statute,[7] the court held that the phrase, "any of the courts of the Commonwealth", did not include federal courts.[8] However, that statute deals with the duties of the county attorney,[9] and therefore the case is clearly distinguishable. In concluding that the legislature intended to include federal courts within our tolling statute, the court reached a result which seems reasonable and in accord with the great weight of authority.[10]

In its analysis, the court treated the first suit filed in federal court (the suit filed by the Ohio administrator) as without legal significance for purposes of the statute of limitation, since that suit was not filed by a qualified party.[11] Although this is the well-settled Kentucky rule, it seems to the writer to be an overly narrow interpretation of Kentucky Revised Statutes 413.270.[12] The statute seems to put the emphasis on the good faith of the plaintiff. In the instant case this interpretation did not affect the decision, since the second suit in federal court by the properly qualified ancillary administrator was brought before the one-year statute of limitations had run.[13]

[5] For the converse of this proposition, *i.e.* when the suit had been dismissed from state court on jurisdictional grounds and then reopened in Federal Court, see Fulkerson v. American Chain and Cable Co., 72 F. Supp. 334 (W.D. Pa. 1947). Although the case is from Pennsylvania, it interprets the Kentucky statute under discussion.

[6] Sears v. Elcomb Coal Co., 253 Ky. 279, 69 S.W. 2d 382 (1934).

[7] CARROLL'S KENTUCKY STATUTES, 1936, secs. 126, 127, Now KY. REV. STAT. 69.210 (1953).

[8] Slayton v. Rogers, 128 Ky. 106, 107 S.W. 696 (1908).

[9] KY. REV. STAT. 69.210 (2) (1953): "The county attorney shall . . . when so directed by the county or fiscal court . . . institute, defend and conduct all civil actions in which the county is interested before any of the *courts of the commonwealth.*" (Emphasis supplied by writer.)

[10] 156 A.L.R. 1097 (1939); 34 AM. JUR. 230 (1941).

[11] Relying chiefly on Vassill's Adm'r v. Scarsella, 292 Ky. 153, 166 S.W. 2d 64 (1942); See also: L. & N. R.R. v. Brantley's Adm'r., 96 Ky. 297, 28 S.W. 477 (1894); Marrett v. Babb's Ex'r. 91 Ky. 88, 15 S.W. 4 (1891).

[12] *Supra* Note 2.

[13] "Saving clauses" are not ordinarily construed to limit the bringing of actions after the discharge of a previous action. For example, even if the first suit in this case had been valid, and even if more than three months had elapsed, after its dismissal, another suit could still have been brought within one year from the date of the injury. 54 C.J.S. 350 (1948); 83 A.L.R. 486 (1939); 34 AM. JUR. 227 (1941).

Nevertheless, the plaintiff would have lost the suit had defendant's definition of "judgment" been accepted. For if "judgment" were taken to be the final order of the trial court, and not its affirmance upon appeal, the plaintiff's suit in the state court would not have been brought within the three-month period.

The court rightly stated that the law on this point is in considerable confusion.[14] It is the writer's opinion that the court, in interpreting "judgment" to mean "final decision on appeal," adopted the better view. The court cited with approval the opinion of the New York Court of Appeals in a similar case.[15] The New York court reasoned that a contrary holding would be inconvenient, since it would require the filing of a second suit while the appeal was pending —a suit which would be unnecessary if the appeal were successful. In reaching this result, the court distinguished a prior Kentucky case[16] arising under another statute[17] where "final judgment" was held to mean the judgment of the trial court and not its affirmance on appeal. In addition to avoiding the pitfall of the Kentucky precedent, the court eluded another trap—the "clear meaning rule." For, undoubtedly, "judgment" ordinarily refers to the final order of a trial court.[18] In the writer's opinion the court is to be commended for looking behind the precise meaning of the term in order to reach a more reasonable decision.

In conclusion, it is felt that the court reached a desirable result in this case. In broadening the term "court of this state" to include federal courts, and in construing the term "judgment" to mean "final judgment on appeal", the Court of Appeals further demonstrated its acceptance of the proposition that cases should be adjudicated on their merits and not on points of procedure. That the court will not always give priority to such a policy is indicated by its narrow construction of the Kentucky tolling statute when an improperly qualified administrator brings the first suit.

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[14] 83 A.L.R. 478 (1933); 34 AM. JUR. 230 (1941).
[15] Wooster v. Forty-Second Street & G. Ferry Co., 71 N.Y. 471 (1877).
[16] Gray v. Sawyer, 252 S.W. 2d 10 (Ky. 1952).
[17] CIVIL CODE OF PRACTICE, sec. 344 (Carroll's Ky. Codes 1948).
[18] See for example, BLACK, LAW DICTIONARY (3rd Edition, 1933), "Judgment . . . the determination of the law, pronounced by a competent judge or court, as the result of an action or proceeding . . ."; BOUVIER, LAW DICTIONARY (8th Edition, 1914): "Judgment . . . the decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein. . . ."; BALLENTINE, LAW DICTIONARY (1930): "Judgment . . . the final consideration and determination of a court of competent jurisdiction upon matters submitted to it in an action or proceeding. . . ." Note that Ballentine does use the word "final." He also defines "judgment" as "the last word in a judicial controversy."

The court, however, can hardly be blamed for not repudiating this well-settled rule, especially in a case in which the application of the rule results in no injustice.[19] In ordering the case to proceed to trial on the merits, the court reached a decision amply grounded on both authority and logic.

TOM SOYARS

STATUTE OF FRAUDS—PERSONAL SERVICES AS PART PERFORMANCE OF ORAL CONTRACT TO DEVISE—Plaintiff brought action against decedent's executor to set aside decedent's will, claiming that decedent had orally contracted to will his property, real and personal, to plaintiff. By the terms of the contract, plaintiff was to receive the property in return for services which she performed in caring for decedent before death. The plaintiff contended that the provision of the Statute of Frauds, requiring land contracts to be in writing was not applicable. The plaintiff further contended in the alternative that her situation was unique since she had already performed the services and since she had left her home and gone to live with the decedent in order to perform the agreement. Therefore, the contract was without the Statute of Frauds even though the statute might apply generally to contracts relating to land. The plaintiff further contended that the contract was severable; therefore the statute would not apply to that portion of the contract concerning personalty. In other words, plaintiff sought to recover either on the theory that the Statute of Frauds did not apply or that the doctrine of part performance governed the validity of this particular contract. The trial court sustained a demurrer to the petition, and the plaintiff appealed. Held: Affirmed. *Bitzer* v. *Moock's Executor and Trustee*, 271 S.W. 2d 877 (Ky. 1954). The court explained that contracts to devise property are generally regarded as entire, and are not severable, despite the fact that the contract includes both realty and personalty, and an oral contract to devise property which includes real estate is barred by the Statute of Frauds. Further, personal services as part performance of a contract to convey or devise will not remove it from the statute, since the party performing has grounds for an action at law in quantum meruit to recover the reasonable value of the services peformed.

Although it might appear that the contract in the principal case

[19] If the Kentucky Court of Appeals should ever decide to reverse itself on this point, without actually repudiating its earlier decisions, (see footnote 11) it might possibly base its change of position on the "spirit of the New Rules" which the court should treat as authorizing a further liberalization of procedure.